



Services, PAB No. D86-119 (1987); Plaisance v. Dep't of Social and Health Services, PAB No. D86-75 (Kent, Hrg. Exam.), aff'd by Board (1987); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

## II. FINDINGS OF FACT

2.1 Appellant Franklin Dare was a Social Worker 2 and permanent employee of Respondent Department of Social and Health Services (DSHS) in Region 6 in the Shelton Community Services Office (CSO). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal on October 5, 2000.

2.2 Appellant's Social Worker 2 job duties included, in part, managing a caseload and providing support to WorkFirst clients. WorkFirst is a federally funded program.

2.3 On April 17, 1992, Appellant attended new employee orientation. At that time he was given a copy of DSHS Administrative Policy 6.03, Employee Participation in Political Activities, and Administrative Policy 6.04, Standards of Ethical Conduct for Employees. Appellant signed a new employee checklist confirming that he had received the information. Appellant was aware of his responsibility to comply with the agency's policies.

2.4 On July 26, 2000, Appellant sent an e-mail to gloria Marshal-Perez, his second-line supervisor. Appellant informed her that he had registered as a candidate for state representative. Ms. Marshal-Perez did not question whether Appellant's campaign was contrary to policy.

2.5 The Shelton CSO shares office space with other agencies. An employee from one of the other tenant agencies told Appellant's immediate supervisor, Judy Mehan, that Appellant had

1 campaign signs on his vehicle. When Ms. Mehan saw the signs, she realized that Appellant was  
2 running for a partisan office. On August 14, 2000, she contacted Human Resources staff and Billie  
3 Hartline, Regional Administrator for Region 6.

4  
5 2.6 By letter dated August 15, 2000, Mr. Hartline provided Appellant with a copy of  
6 Administrative Policy 6.03 and a brochure entitled "Political Activity and the State and Local  
7 Employee" prepared by the U.S. Office of Special Counsel. The brochure provides an overview of  
8 permissible and prohibited political activities under the Federal Hatch Act. In addition, Mr.  
9 Hartline asked Appellant to make a choice to either withdraw from the campaign or to resign his  
10 position with DSHS.

11  
12 2.7 By letter dated August 17, 2000, John Atherton, Acting Assistant Secretary, informed  
13 Appellant that the agency would be compelled to initiate action to terminate his employment if he  
14 decided to continue his campaign while remaining employed by DSHS.

15  
16 2.8 Candy Christensen, Deputy Director for Human Resources, was informed by her staff that  
17 Appellant could potentially be in violation of the Federal Hatch Act. She sought advice from the  
18 Office of Special Counsel in Washington, DC, and learned that Appellant needed to make a choice  
19 to either resign his position or resign from the campaign. Ms. Christensen also learned that  
20 Appellant could continue to work for DSHS if his employment with the agency was not his  
21 principal employment. In addition, she learned that the Office of Special Counsel was going to  
22 charge Appellant with a violation of the Hatch Act.

23  
24 2.9 Appellant did not voluntarily resign, withdraw from the campaign, or reduce his  
25 employment with DSHS.

1 2.10 By letter dated September 12, 2000, Mr. Hartline notified Appellant of his dismissal  
2 effective October 2, 2000, for neglect of duty, incompetence, and willful violation of the published  
3 employing agency or department of personnel rules or regulations. Mr. Hartline told Appellant,  
4 "you are being disciplined for campaigning for a partisan political office, State Representative in  
5 District 35, position 1, while employed as a Social Worker 2 at the Shelton Community Services  
6 Office, where your position is funded, in whole or in part, by federally funded grants or loans."

7  
8 2.11 DSHS Administrative Policy 6.04, Standards of Ethical Conduct for Employees, applies to  
9 all DSHS employees. The policy states, in relevant part:

10 The Department of Social and Health Services requires employees to perform duties  
11 and responsibilities in a manner that maintains standards of behavior that promote  
12 public trust, faith, and confidence, specifically, employees:

13 . . . .  
14 Strengthen public confidence in the integrity of state government by demonstrating  
15 the highest standards of personal integrity, fairness, honesty, and compliance with  
16 laws, rules, regulations, and departmental policies. . . .

17 2.12 DSHS Administrative Policy 6.03, Employee Participation in Political Activities, applies to  
18 all agency employees. The policy specifically addresses employees in programs that receive federal  
19 assistance and are subject to the Federal Hatch Act. The policy states, in relevant part:

20 Employees may express their opinions of political subjects and candidates, take an  
21 active part in political campaigns, and wear political campaign badges and buttons  
22 when not serving in an official capacity or meeting the public. There are a number  
23 of prohibited activities, including, but not limited to, the following

24 . . . .  
25 Employees are prohibited from being a candidate for public elective office in a  
26 partisan election. . . .

27 2.13 RCW 41.06.250(4) of the State Civil Service Law states:

28 For persons employed in state agencies or agencies of any political subdivision of  
29 the state the operation of which is financed in total or primarily by federal grant-in-

aid funds political activity will be regulated by the rules and regulations of the United States civil service commission.

2.14 Prior to 1979, the U.S. Civil Service Commission had primary responsibility for enforcing the Hatch Act. The Civil Service Reform Act of 1978 transferred the Commission's investigative and prosecutorial authority to the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB). The MSPB adjudicates formal disciplinary actions filed by the OSC.

2.15 A preponderance of the credible testimony establishes that Administrative Policy 6.03 was adopted to implement the Hatch Act, Title 5 U.S.C. § 1501 et al. Section 1502 of the Hatch Act prohibits state employees whose salary, in whole or part, comes from federal loans or grants from campaigning for partisan political office. Sections 1504, 1505, and 1506 of the Act provide a process for determining whether a violation has occurred. Title 5 U.S.C., Chapter 15, states, in relevant part:

§ 1501(4) "State or local officer or employee" means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency. . . .

§ 1502(a) A state or local officer or employee may not -  
.  
(3) be a candidate for elective office.  
.

§ 1504 When a Federal agency charged with the duty of making a loan or grant of funds of the United States for use in an activity by a State or local officer or employee has reason to believe that the office or employee has violated section 1502 of this title, it shall report the matter to the Special Counsel. On receipt of the report or on receipt of other information which seems to the Special Counsel to warrant an investigation, the Special Counsel shall investigate the report and such other information and present his findings and any charges based on such findings to the Merit Systems Protection Board, which shall -  
(1) fix a time and place for a hearing. . . .

1 § 1505 Either the State or local officer or employee or the State or local agency  
2 employing him, or both, are entitled to appear with counsel at the hearing under  
3 section 1504 of this title and be heard. After this hearing, the Merit Systems  
Protection Board shall -

4 (1) determine whether a violation of section 1502 of this title has occurred;

5 (2) determine whether the violation warrants the removal of the officer or employee  
from his office or employment; and

6 (3) notify the officer or employee and the agency of the determination by registered  
or certified mail.

7  
8 § 1506 (a) When the Merit Systems Protection Board finds -

9 (1) that a State or local officer or employee has not been removed from his office or  
employment within 30 days after notice of a determination by the Board that he  
violated section 1502 of this title and that the violation warrants removal . . . .

10 . . . .  
the Board shall make and certify to the appropriate Federal agency an order requiring  
11 that agency to withhold from its loans or grants to the State or local agency to which  
notice was given an amount equal to 2 years' pay at the rate the officer or employee  
12 was receiving at the time of the violation. . . .

13 . . . .

14  
15 2.16 Appellant was dismissed from his position with DSHS before OSC issued findings and  
16 forwarded those findings to the MSPB, and before the MSPB held a hearing to determine whether  
17 Appellant violated Title 5 U.S.C. Chapter 15, §1502.

### 18 19 **III. ARGUMENTS OF THE PARTIES**

20 3.1 Respondent argues that the agency does not have the ability to enforce the Hatch Act and  
21 therefore, this appeal is about a violation of agency policy, not about a violation of the Hatch Act.  
22 Respondent argues that Appellant ran for partisan political office while employed in a position  
23 falling under the Hatch Act. Respondent contends that Appellant acted contrary to and in violation  
24 of DSHS policies. Respondent asserts that the agency has authority to implement disciplinary  
25 action for a violation of agency policy without a determination of a violation of the Hatch Act being  
26 made by the OSC or the MSPB. Respondent further asserts that the agency had no choice but to

1 dismiss Appellant given his blatant violation of policies. Respondent contends that subsequent to  
2 Appellant's dismissal, the OSC found that he had violated the Hatch Act. Therefore, Respondent  
3 asserts that if Appellant is reinstated, the final outcome will be the same. Respondent argues that  
4 the agency applied its policies, found misconduct and determined that termination was appropriate.  
5 Respondent asks the Board to uphold the disciplinary action and deny the appeal.

6  
7 3.2 Appellant argues that there is little dispute of fact and that the issue before the Board is a  
8 question of law. Appellant asserts that the agency policy was implemented to comply with the  
9 Hatch Act and that it was not intended to prohibit anything that the Hatch Act does not prohibit.  
10 Appellant further asserts that the state statute, RCW 41.06.250, removes from DSHS or any state  
11 agency the authority to interfere with his right to have this matter heard and resolved by the MSPB.  
12 Appellant argues that he cannot violate the policy without violating the Hatch Act, that violations of  
13 the Hatch Act are determined by the MSPB not by DSHS, and that DSHS should have followed the  
14 law and allowed the process under Title 5 U.S.C. Chapter 15 to proceed. Appellant asks that he be  
15 reinstated and allowed to exercise his rights before the MSPB.

#### 16 17 IV. CONCLUSIONS OF LAW

18 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter  
19 herein.

20  
21 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
22 the charges upon which the action was initiated by proving by a preponderance of the credible  
23 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
24 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
25 Corrections, PAB No. D82-084 (1983).

1 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her  
2 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
3 of Social & Health Services, PAB No. D86-119 (1987).

4  
5 4.4 Incompetence presumes a lack of ability, capacity, means, or qualification to perform a  
6 given duty. Plaisance v. Dep't of Social and Health Services, PAB No. D86-75 (Kent, Hrg. Exam.),  
7 aff'd by Board (1987).

8  
9 4.5 Willful violation of published employing agency or institution or Personnel Resources  
10 Board rules or regulations is established by facts showing the existence and publication of the rules  
11 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
12 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &  
13 Health Services, PAB No. D93-053 (1994).

14  
15 4.6 Respondent has failed to meet its burden of proof. Policy 6.03 cannot stand by itself.  
16 Agency policies must comply with the state civil service law, in this case, specifically RCW  
17 41.06.250. RCW 41.06.250 requires that questions regarding political activity of employees in  
18 agencies that receive federal funds be regulated by the rules and regulations of the MSPB, the  
19 successor to the U.S. Civil Service Commission. DSHS does not have independent authority to  
20 determine whether an employee's political activities violate federal law. Neither does this Board.  
21 DSHS acted prematurely in dismissing Appellant prior to the MSPB making a determination that a  
22 Hatch Act violation occurred and that the violation warrants Appellant's removal from his position.

23  
24 4.7 We realize that the MSPB process may result in Appellant's dismissal. However, under the  
25 facts and circumstances presented here and in consideration of the clear and unambiguous language  
26 of the relevant laws and regulations, it was premature to dismiss Appellant based on agency policy



1 alone. Likewise, it is premature to determine whether in this case, a violation of agency policy  
2 should result in a charge of neglect of duty or incompetence. Therefore, the appeal should be  
3 granted.

4  
5 **V. ORDER**

6 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Franklin Dare is granted and  
7 he is reinstated to a Social Worker 2 position with all employee rights and benefits, including back  
8 pay, sick leave, vacation accrual, retirement and OASDI credits as provided in RCW 41.06.220.

9 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

10 WASHINGTON STATE PERSONNEL APPEALS BOARD

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13 Walter T. Hubbard, Chair

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16 Gerald L. Morgen, Vice Chair

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